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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-863

F. BROWNE GREGG,
PETITIONER,

VERSUS

U. S. INDUSTRIES, INC., and
DIVERSACON INDUSTRIES, INC.,
RESPONDENTS.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WILLIAM F. SONDERICKER
299 Park Avenue
New York, New York 10017
(212) 688-0400

DAVID A. DREXLER
12th and Market Streets
Wilmington, Delaware 19899
(302) 648-9200

Counsel for Respondents

Of Counsel:

MARY C. MONE
GARY HOPPE
OLWINE, CONNELLY, CHASE
O'DONNELL & WEYHER
299 Park Avenue
New York, New York 10017

MORRIS, NICHOLS, ARSHT
& TUNNEL
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Reasons for Denying the Writ

F. Browne Gregg's petition for a writ of certiorari presents a routine question of judicial administration—namely, the extent of relief to which a defendant is entitled when a judgment is reversed upon appeal after it has been executed upon. Petitioner cannot and does not claim that this case presents a conflict in decisions of circuit courts, an important federal question undecided by this Court, or any of the other reasons for allowing a writ set forth in Rule 19 of the Supreme Court Rules. For these reasons, Gregg's petition should be denied.

In seeking to fabricate a constitutional issue where none exists, Gregg claims that he was denied restitution and that the question presented in this action is whether he "may be deprived of restoration of the full value of his property interest . . . by application of the principle that constitutional decisions shall have prospective effect only" (Pet. 3, 9n)* The short answer is that the lower courts did award Gregg restitution and that the "question" stated by Gregg is not raised by the decisions below.

U. S. Industries, Inc. and Diversacon Industries, Inc. (hereinafter collectively called "USI") brought suit against Gregg in Delaware seeking jurisdiction over him by sequestration of shares of stock owned by Gregg in U. S. Industries, Inc., a Delaware corporation, pursuant to a procedure of then longstanding judicial acceptance. After unsuccessfully challenging the constitutionality of sequestration before the District Court, Gregg defaulted in appearance. The court ordered sale of the sequestered property and awarded USI a default judgment in the net amount of the proceeds. Four years after the initial seizure, the Court of Appeals for the Third Circuit held that the operation of the Delaware sequestration procedure as utilized against Gregg was unconstitutional and remanded the case to the District Court with a direction to dismiss the complaint for want of jurisdiction. The holding of the Court of Appeals was subsequently adopted by this Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977). Upon remand, Gregg filed the motion for "restitution" which is the basis for the present controversy.

In cases such as this where a judgment, attachment, sequestration or other court-ordered seizure has been reversed, any award of restitution is based on the theory of unjust enrichment. (Pet. 17a) USI, accordingly, offered to return

*Citations to material in Gregg's petition and the opinions below set forth in his appendix will be made to the appropriate page number as follows: (Pet.).

to Gregg the amount USI actually received from the sale of the sequestered stock, and the District Court awarded Gregg that amount, with interest. (Pet. 16a-17a)

Gregg, however, while bringing his claim in the guise of a "motion for restitution," sought recovery of an amount much greater than the sum USI received pursuant to the vacated judgment. The District Court held that such further recovery could not be supported by any theory of restitution, stating that it had "found no case in which a plaintiff, following a reversal of an erroneous injunction, judgment, attachment or other decree has received in restitution an amount greater than the value of the benefit which had been conferred upon his opponent as a result of the erroneous order." (Pet. 16a-17a) The District Judge concluded that Gregg's claim for recovery in excess of this amount is in reality a claim for damages, not restitution, and must be supported by a proper basis for damages.

Most courts have treated claims for recovery beyond the value of the benefit conferred by an erroneous order as damages claims, and have held them to be subject to a different set of legal principles than those applicable to claims for restitution. There is, of course, good reason to distinguish between such damage claims and restitution claims based upon unjust enrichment. An unjust enrichment claim presents only the issue of whether a party should be able to retain a windfall. A claim for damages, on the other hand, may present the much more difficult issue of how a loss should be apportioned between parties, neither of whom has benefitted from, or been 'at fault' with respect to the transaction giving rise to the loss.

Before a court will award damages which have resulted from a reversed judgment, there is usually a requirement that there be proof of malice or lack of probable cause in instituting the action on the part of the plaintiff. (Pet. 17a-18a)

That is the real holding of the court below: Gregg sought recovery of some \$750,000 in excess of what USI received pursuant to the reversed judgment (representing the amount the market value of his stock declined during sequestration), and the court held that Gregg could not recover that amount unless he proved a cause of action for damages. There is no conflict in authority on this issue. *See, e.g., Hartford-Empire Co. v. Shawnee Mfg. Co.*, 163 F.2d 474 (3rd Cir. 1947); *Chain O'Mines, Inc. v. United Gilpin Corp.*, 131 F.2d 824 (7th Cir. 1942); *Greenwood County v. Duke Power Co.*, 107 F.2d 484 (4th Cir. 1939), *cert. denied*, 309 U.S. 667, (1940); *United Motors Service v. Tropic-Aire*, 57 F.2d 479 (8th Cir. 1932); *Tenth Ward Road Dist. No. 11 v. Texas & P. Ry.*, 12 F.2d 245 (5th Cir. 1926); *Kansas City Southern Ry. v. Southern Trust Co.*, 279 F. 801 (8th Cir. 1922); *Monolith Portland Midwest Co. v. Reconstruction Finance Corp.*, 128 F. Supp. 824, 878 (S.D. Cal. 1955), *vacated on other grounds*, 240 F.2d 444 (9th Cir. 1957).

The District Court then examined the record and the law to see if a factual basis for such a cause of action existed. It concluded that: (1) USI's reliance on the Delaware statute not theretofore declared unconstitutional could not amount to the "wrongfulness, malice or lack of probable cause" necessary to support a recovery of damages;* and

**See Downs v. Jacobs*, 272 A.2d 706 (Del. 1970). Once again, a point on which the courts which have considered this issue agree. *See, e.g., McShane Co. v. McFadden*, 554 F.2d 111 (3d Cir.), *cert. denied*, 434 U.S. 857, (1977); *Kacher v. Pittsburgh National Bank*, 545 F.2d 842 (3d Cir. 1976); *Tucker v. Maher*, 497 F.2d 1309 (2d Cir. 1974); *Rios v. Cessna Finance Corporation*, 488 F.2d 25 (10th Cir. 1973).

In his petition, Gregg argues that the denial of relief based upon this conclusion serves to deprive him of the benefits of his victory, by making the right to damages prospective only in the sense that it is available to future defendants, but not to him. This contention is nonsense. Gregg was awarded the full benefit of the Circuit Court's holding: the default judgment against him was *vacated*. The denial of damages (above and beyond the award of restitution) was based upon the law of post-judgment remedies and the absence of any of the elements necessary to establish a right to such relief.

(2) in any event it would be inequitable to have USI pay for the loss occasioned by the drop in the market value of Gregg's stock after the entry of sequestration but before the entry of default judgment, since (a) the sequestration order expressly gave Gregg the power to sell the stock and direct re-investment of the proceeds and "if there was any way in which the loss could have been avoided, it would have been through action by Gregg"* (Pet. 23a) and (b) the actual sales of the sequestered stock during this interim period had been caused not by USI, but by Gregg's bank, to whom he had previously pledged the stock to secure a loan. The bank's prior lien upon Gregg's stock was fully recognized by the District Court, and sales of stock were made when its market value fell below the margin requirements on Gregg's indebtedness. (Pet. 10a-12a)

Gregg, therefore, was not, as he would have this Court believe, deprived of any recovery by application of a procedural or technical rule that constitutional decisions shall have prospective effect. He was awarded the full amount of restitution due by the District Court. His motion for recovery was denied only insofar as he sought damages in excess of restitution, on the ground that USI did not act wrongfully in relying on a statutory sequestration procedure not previously declared unconstitutional and, in any event, any loss was not caused by USI. The Court of Appeals affirmed on the basis of the District Court's opinion.

The case presents nothing but routine employment of the law of judicial administration and, to the extent Gregg seeks damages in excess of restitution, application of state law on issues of post-judgment remedies; points on which the courts are in full agreement. There was no error.

**See Plessner v. Continental Casualty Co.*, 25 Misc. 2d 518, 521, 82 N.Y.S.2d 540, 544 (Sup. Ct., N.Y. Co. 1948).

Conclusion

For the reasons set forth above, Gregg's petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM F. SONDERICKER
299 Park Avenue
New York, New York 10017
(212) 688-0400

DAVID A. DREXLER
12th and Market Streets
Wilmington, Delaware 19899
(302) 648-9200
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299 Park Avenue

New York, New York 10017

MORRIS, NICHOLS, ARSHT

& TUNNEL

12th and Market Streets

Wilmington, Delaware 19899

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